

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GLEN WILLIAM NICKERSON, JR.,

Petitioner,

No. C 98-04909 MHP

v.

ORDER

ERNIE ROE, WARDEN OF CALIFORNIA
STATE PRISON AT LOS ANGELES,
CALIFORNIA,

Respondent.

Petitioner is an inmate of the California state prison at Los Angeles following his conviction of two counts of murder and one count of attempted murder. On December 28, 1998, petitioner filed a petition for a writ of habeas corpus with this court. Petitioner's motion for release on his own recognizance is now before the court.

BACKGROUND

In 1985, a California jury convicted petitioner of two counts of first degree murder and one count of attempted murder. Petitioner sought habeas relief in state court. The California Supreme Court denied his petition on December 22, 1998.

On December 28, 1998, petitioner filed his federal habeas petition. On December 1, 1999, this court held that AEDPA's one-year statute of limitations was tolled from April 23, 1997 (one year after the date of enactment of the AEDPA) to December 22, 1998 (the date on which the California Supreme Court dismissed the petition). The court determined that the statute of limitations expired on December 23, 1998, two court days before petitioner filed his federal petition. The court dismissed the petition as untimely.

Petitioner moved for reconsideration of the dismissal of his habeas petition. He submitted with his motion newly discovered exculpatory evidence. On September 14, 2000, the court granted the motion for reconsideration on the basis of the evidence of actual innocence. The parties are now engaged in the

1 discovery process.

2
3 LEGAL STANDARD

4 A federal court has authority to release a state prisoner on recognizance or surety in the course of a
5 habeas proceeding. See Marino v. Vasquez, 812 F.2d 499, 507 (9th Cir. 1987); Rodgers v. Merkle,
6 1995 WL 108196, *3 (N.D. Cal.). This authority derives from the power to issue the writ itself. Marino,
7 812 F.2d at 507. Bail pending a decision on a habeas petition is reserved for extraordinary cases involving
8 special circumstances or a high probability of success. See Land v. Deeds, 878 F.2d 318, 318-19 (9th
9 Cir. 1989) (citing Aaronson v. May, 85 S. Ct. 3, 5 (1964)); see also United States v. Mett, 41 F.3d 1281,
10 1282 (9th Cir. 1995); Rodgers, 1995 WL 108196 at *3.

11 The court thus has authority to release petitioner on his own recognizance. Benson v. California,
12 328 F.2d 159 (9th Cir. 1964), cited by respondent, is not to the contrary. In Benson, petitioner sought bail
13 pending appeal of the denial of his habeas petition. Benson, 328 F.2d at 160. The court denied the
14 request for bail. The court explained, “[i]t would not be appropriate for us at this stage of the proceeding
15 to enlarge this petitioner on bail even if we found that the allegations of his petition for habeas corpus made
16 out a clear case for his release. Something more than that is required before we would be justified in
17 granting bail.” Id. at 162 (footnote omitted). In a footnote, the court added that there are thousands of
18 prisoners who would have no difficulty drafting a petition for habeas corpus alleging substantial violations of
19 their constitutional rights. See id. at n.2. The court declined to propose to “open the door to the release of
20 those thousands of prisoners on the basis of mere allegations in their petitions.” Id.

21
22 DISCUSSION

23 The court concludes that this case presents extraordinary circumstances warranting petitioner’s
24 release. The court has reviewed the allegations appearing in petitioner’s habeas petition, and has found that
25 the petition raises significant issues of constitutional dimension. For example, the allegations of the habeas
26 petition strongly suggest that the trial which resulted in petitioner’s convictions was marked by the
27 suppression and destruction of evidence and perjury by the state’s investigators. If these allegations are
28

1 correct, petitioner has served almost seventeen years for crimes he did not commit.

2 The court is mindful that many prisoners, in the words of the Benson court, could easily draft a
3 petition alleging substantial constitutional violations. See Benson, 328 F.2d at n.2. Consequently, granting
4 a petitioner release pending review of his habeas petition requires “[s]omething more.” Id. at 162; see also
5 Land, 878 F.2d at 318-19 (requiring special circumstances or a high probability of success). In support of
6 his motion for release, petitioner offers more than just the allegations of his petition. Petitioner has
7 submitted the deposition testimony of Charles Constantinides, a Deputy District Attorney of Santa Clara
8 County. Constantinides represented petitioner’s co-defendant, Murray Lodge, in the state court
9 proceedings involving the subject crimes. See Deposition of Charles Constantinides 6:16-17, 7:23-8:2.
10 According to Constantinides, Lodge told him that Nickerson was not involved in the crimes.
11 Constantinides Depo. 16:24-17:2, 19:13-15. Constantinides testified that Lodge told him only three
12 people committed the crimes, and Nickerson was not among the three. Constantinides Depo. 19:21-25,
13 20:1-7. Constantinides testified that once he became more familiar with the facts in the case and was able
14 to evaluate Lodge’s statements himself, he came to believe that petitioner had nothing to do with the crimes.
15 Constantinides Depo. 57:13-21.

16 In addition, petitioner proffers the declaration of his father and step-mother, who have appeared at
17 each hearing on this motion and who live, work and own a residence in this district. See Declaration of
18 Glen William Nickerson, Sr. ¶¶ 3-4; Declaration of Montie Nickerson ¶¶ 3-4. Petitioner’s father and step-
19 mother have agreed to provide petitioner with lodging at their residence pending final disposition of his
20 habeas petition. See Decl. of Glen William Nickerson, Sr. ¶ 5; Decl. of Montie Nickerson ¶ 5. Petitioner
21 also offers the representation of counsel that petitioner’s health is failing. Petitioner has had gastro-intestinal
22 surgery and needs medical attention, possibly including additional surgical procedures.

23 Finally, the court is persuaded that the pace at which this action is progressing amounts to a special
24 circumstance weighing in favor of release. The court granted petitioner’s motion for an order granting
25 discovery on January 30, 2001. To date, respondent has not fully satisfied its discovery obligations and
26 demonstrates a persistent resistance to doing so.

27 The court concludes that the gravity of the allegations of the petition, the record developed thus far,
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1 petitioner's failing health and the dilatory pace of these proceedings justify granting petitioner's motion for
2 release.

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4 CONCLUSION

5 For the reasons stated above, the court hereby GRANTS petitioner's motion for release upon:

6 1) the posting of bail in the amount of \$500,000 secured as determined appropriate by the General
7 Duty Magistrate Judge; and

8 2) the setting of conditions of release as determined appropriate by the General Duty Magistrate
9 Judge.

10 This matter is referred to the Pretrial Services of this District for the preparation of a report and
11 recommendation of release conditions.

12 RESPONDENT SHALL PRODUCE THE PETITIONER BEFORE THE GENERAL DUTY
13 MAGISTRATE JUDGE OF THIS COURT WITHIN TEN (10) DAYS OF THE DATE OF THIS
14 ORDER for the purposes of accomplishing the bail and release provisions set forth above.

15 IT IS SO ORDERED.

16
17 Dated:

18 _____
19 MARILYN HALL PATEL
20 Chief Judge
21 United States District Court
22 Northern District of California
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